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HAROLD B. WILLEY, C

IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

No. 433

THOMAS CONSTANCE,

Petitioner,

—against—

ARTHUR J. HARVEY, Trustee in Bankruptcy of FRANCIS THOMAS REILLY,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

The Respondent respectfully submits the following brief in opposition to the petition for a writ of certiorari to review the decision and decree of the United States Court of Appeals for the Second Circuit in the above-entitled matter.

The proceeding herein arose in the manner set forth in the petition. The Respondent agrees with the statement of facts set forth therein, except as follows:

The lower courts held that the failure of the Town Clerk of Watervliet to accept and file the copy of

the chattel mortgage forwarded to him in behalf of the Petitioner was erroneous. They further held that the delay of ten months and seven days between this attempt to file the mortgage on November 25, 1949 and the date when it was actually accepted for filing—October 5, 1950—was unreasonable and resulted from inaction on the part of the creditor, and that no excuse or proof of extenuating circumstance was offered by the creditor to avoid the consequences of this inaction. As a result, it was uniformly held by all the lower courts that no filing occurred until October 5, 1950 and that this filing, over ten months later, was unseasonable and therefore void as to creditors.

The United States Court of Appeals held that the chattel mortgage was void as a result of the failure to file it within a reasonable time of its execution and as a result, the Trustee in Bankruptcy is entitled to be put in the position of "ideal" hypothetical creditor whose rights, as construed by the New York Courts, were superior to that of the mortgagee, Constance, the Petitioner herein.

The Questions Presented

1. What is the status of a mortgage affecting chattels in the State of New York, as to creditors of the mortgagor, if the official designated by statute to accept such mortgage for filing fails to file the mortgage, upon the receipt by him of the mortgage and filing fee, but returns it to the sender, the attorney for the mortgagee, and he then holds it without any investigation as to the justification for the official's refusal to file it and subsequently, over ten months later, again presents the mortgage for filing and it is then accepted?

2. Assuming such mortgage is void as against intervening creditors because of lack of proper and timely filing, is the right of the Trustee in Bankruptcy to the property affected by the fact that the mortgage was actually filed some eleven months before the Petition in Bankruptcy was filed, but over ten months after it was executed?

Argument in Opposition to Petition for Writ of Certiorari

The basic question herein involved is as to the validity of the chattel mortgage of the Petitioner Constance. This involves a question of the Law of the State of New York and its interpretation and construction by the Courts. It has been conceded or assumed throughout by the parties and all the lower courts that the Lien Law of the State of New York, specifically Sections 230, 232 and 233, and the interpretation and construction thereof, governs the validity of the chattel mortgage. These sections of the Lien Law are set forth in the Petition and not repeated here. As may be seen from a perusal thereof, provisions of the law itself state no specific time after the execution of a chattel mortgage within which it shall be filed in order to be valid against subsequent creditors. The Courts of New York have interpreted the statute as requiring a filing of the chattel mortgage within a reasonable time after its execution, *Tooker* v. *Siegel Cooper Co.,* 194 N. Y. 442, 154 N. Y. S. 899 (1909). The Petitioner makes no serious claim that the filing on October 5, 1950 was within the reasonable time as required by New York law, but rather advances the theory of constructive filing of the mortgage as of November 25, 1949, when the Town

Clerk of Watervliet apparently refused to accept and file it. Petitioner's theory is that the failure or refusal of the Clerk charged with the duty of accepting and filling such mortgages is not to be charged against one claiming under it.

The following cases have been submitted and argued in the lower courts with reference to this question: *Manton* v. *Brooklyn & Flatbush Realty Co.,* 217 N. Y. 284 (1916); *Pres. etc. of the Manhattan Company* v. *Laimbeer,* 108 N. Y. 578 (1888); *New York County Nat. Bank* v. *Wood,* 169 App. Div. 817, 153 N. Y. Supp. 860 (1st Dept. 1915), aff'd 222 N. Y. 662; *In re Labb,* 42 F. Supp. 542 (W. D. N. Y. 1941). It is respectfully submitted, as was held by the United States Court of Appeals, that in each of these cases the fault was entirely that of the public official involved without any negligence on the part of the persons attempting to file, or there were no intervening rights of third parties. In the *Wood* case (*supra*), the managing clerk of the lienor's attorney took back to his superior the instrument which he had unsuccessfully attempted to file. The matter was promptly followed up and filing actually accomplished within less than one hour. The Court held that a lien filed during the interim was not superior as the acts of the first lienor were such as to allow him the benefit of constructive filing at the earlier time and he was not to be penalized by the clerk's error. In the case at bar, it has been found by the Referee, upon the testimony of the attorney, that the attorney for the mortgagee knew that the mortgagor resided in Watervliet and the attorney himself testified that he understood the law requiring filing there. (Case on Appeal, pages 36 and 37). Yet he did nothing further to accomplish filing in Watervliet until over ten months after the

clerk had returned the mortgage to him and he offered no excuse to the Court for this inaction.

In the *Manton* case (*supra*), Mr. Justice Cardozo's opinion aptly applies to the situation at bar (page 228).

> "The defendant insists, however, that a distinction must be made between a case where the failure to redocket is due to the neglect of the clerk and one like the case at bar where it is due to the default of the lienor himself. The distinction *is a real one.* The docket does not create the lien but it does give notice of the lien. *If the act of the lienor has made notice impossible he must be held to have estopped himself from enforcing his lien against persons who had otherwise been misled to their prejudice.*" . . .
>
> "That is not because the lien does not exist but because his election to keep the secret deprives him in such circumstances of the right to enforce it." (Cases cited.) "The lienor who willfully or negligently keeps his lien off the docket knows or ought to know that someone is relying upon his silence and will be injured by that silence." (Italics added.)

In re Labb (*supra*), decided by one of the Federal District Courts in New York, involved a question of erroneous indexing and the Court held there that the purchaser was "obliged only *to leave* the contract with the public officer, direct that officer to file and pay the regular filing fee." (Italics added.) Mr. Justice Foley in the District Court, commented on this statement in his opinion, stating that he did not

think the petitioner herein made an adequate delivery of the instrument in the ordinary sense "to leave the instrument for filing", and that therefore he did not come within the holding in the *Labb* case, but rather that the holding in the *Manton* case "snugly fits" the situation in question.

The United States Court of Appeals in its final opinion clearly and succinctly covered the point concerning the Trustee's rights as against those of the creditor where the filing of the mortgage was not timely. The construction of the New York Lien Law by the New York Courts was cited as making unrecorded chattel mortgages void as to simple contract creditors becoming such, without notice, prior to actual recording. The Court then went on to say "Since an existing creditor, without notice of the chattel mortgage, could have obtained a lien at the time of the filing of the petition in bankruptcy, and since under Section 70 (c) of the Bankruptcy Act the Trustee was entitled to be put in the position of an 'ideal' hypothetical creditor—*Hoffman* v. *Cream-O-Products,* 180 F. 2d 649 (2d Cir.), cert. denied 340 U. S. 815 (1950)—we think his position must prevail over that of the mortgagee-appellant."

Conclusion

It is respectfully submitted that the Petition for Writ of Certiorari herein should be denied on the following grounds:

(a) The holding of the United States Court of Appeals as to the validity of the chattel mortgage is consistent with the holdings of the New York State Courts on the question.

(b) No substantial or important question of Federal Law, which has not been previously passed upon by this Court, is involved.

(c) The sole question of Federal Law involving the rights of the Trustee in Bankruptcy in such a situation has been previously decided and this Court denied Certiorari in one instance where it was sought to have the question reviewed. (*Hoffman* v. *Cream-O-Products,* 180 F. 2d 649 (2d Cir.)), cert. denied 340 U. S. 815 (1950).

Dated: November 23, 1954.

Respectfully submitted,

HARVEY M. LIFSET,
Attorney for Respondent.